STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 14, 2013
v	No. 308883 Kent Circuit Court
ARTHUR DAWAYNE ROBINSON, Defendant-Appellant.	LC No. 11-006807-FH

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

Defendant, Arthur Dawayne Robinson, appeals as of right his conviction for domestic assault, third offense, MCL 750.81(4). The trial court sentenced defendant as an habitual offender, fourth offense, to 46 months to 15 years' imprisonment. We affirm.

I. BASIC FACTS

This case arises out of an incident of domestic violence, the pertinent events of which occurred on the night of June 26, 2011, and into the morning. Defendant and the victim were in a dating relationship since August 2010, despite the victim's discovery in February 2011 that defendant had been involved with another woman. Defendant was staying at the victim's home on the night in question when defendant received a call on his cellular telephone. The victim answered the telephone, but the caller claimed to have the wrong number and ended the call. The victim became upset, and an argument ensued between the victim and defendant. According to the victim, she removed herself from the argument and went upstairs to her daughter's room. About 4-1/2 hours later, defendant went upstairs and asked the victim to accompany him downstairs to talk. The victim agreed, and they began arguing again downstairs. According to the victim, the argument became physical; defendant struck her in the jaw, spit in her face twice, bit her right index finger, and choked her twice, causing her to urinate on herself.

The victim's daughter heard the altercation and called the victim's mother, who then called the victim's home telephone. When the telephone rang, the physical altercation stopped. The victim spoke to her mother on the telephone upstairs and told her to call the police. When the police arrived, they saw defendant smoking a cigarette on the front porch. Defendant quickly went into the victim's townhouse, shutting the door behind him. The police knocked on the front door, and the victim answered, crying and visibly shaken. After locking the victim in their patrol vehicle at her request, the two officers at the scene approached the townhouse to locate

defendant. The officers heard defendant running through the woods behind the home. After a brief chase of defendant on foot, a third officer driving to the victim's house saw defendant, exited his vehicle, and apprehended defendant after a brief foot chase.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence was insufficient to support the jury's verdict. "We review de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *Id.* at 196.

> A person is guilty of domestic assault when he or she
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> assaults or assaults and batters his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household . . . . [MCL 750.81(2)]

Here, in addition to proving a domestic assault, the prosecution was required to prove, pursuant to MCL 750.81(4), that defendant had "2 or more previous convictions for assaulting or assaulting and battering" an individual with whom he had one of the relationships described in MCL 750.81(2).

Defendant does not contest that he was in a dating relationship with the victim or that he had two or more previous convictions for domestic assault. He only challenges whether the evidence was sufficient to establish an assault or battery. His argument is without merit. The victim testified that defendant choked her twice, struck her in the jaw, bit her finger, and spit in her face twice. Each of these actions constitutes a battery. See *People v Cameron*, 291 Mich App 599, 614; 806 NW2d 371 (2011) (a battery is "an intentional, unconsented and harmful or offensive touching of the person of another").

Defendant argues that the evidence against him was insufficient because the victim's testimony lacked credibility and there was no evidence to corroborate her testimony. As to defendant's first claim, "[w]e will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012) (quotation omitted). As to his second claim, there was circumstantial evidence corroborating the victim's testimony. For instance, one of the police officers who responded to the victim's home testified that the victim was crying and was "visibly shaken" when he spoke with her. Additionally, there was evidence of defendant's consciousness of guilt because he fled when police officers arrived and was later dishonest with the police. See *People v Kowalski*, 489 Mich 488, 509; 803 NW2d 200 (2011); *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008).

Accordingly, viewed in a light most favorable to the prosecution, there was sufficient evidence for a rational jury to find beyond a reasonable doubt that defendant committed a domestic assault. See *Ericksen*, 288 Mich App at 196.

B. JAIL CREDIT

Next, defendant argues that he is entitled to credit against his current minimum sentence for the 227 days he served while awaiting sentencing. Defendant, who was on parole at the time of the offense, did not receive credit against his new minimum sentence for these 227 days served.[1] We conclude that defendant waived this issue at sentencing when his trial counsel acknowledged that defendant would not receive credit against his new minimum sentence for the 227 days served. See *People v Breeding*, 284 Mich App 471, 486; 772 NW2d 810 (2009). Moreover, our Supreme Court has already rejected defendant's arguments on this issue in *People v Idziak*, 484 Mich 549, 562-567; 773 NW2d 616 (2009). We are bound by that decision. See *People v Watson*, 245 Mich App 572, 597; 629 NW2d 411 (2001).

C. EVIDENCE ADMITTED UNDER MCL 768.27c

Next, defendant argues that the trial court abused its discretion by allowing the prosecution to admit evidence of the victim's prior consistent statement to police officers. At trial, the prosecution admitted evidence of the victim's prior consistent statement concerning the assault pursuant to MCL 768.27c. Although defendant objected to the admission of this statement at trial, he did not do so for any of the reasons he now asserts as error. Thus, defendant's arguments are unpreserved, see *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003) ("[A]n objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground."), and our review is for plain error, see *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"In MCL 768.27c, the Legislature determined that under certain circumstances, statements made to law enforcement officers are admissible in domestic violence cases." *People v Meissner*, 294 Mich App 438, 445; 812 NW2d 37 (2011). "Our Legislature enacted MCL 768.27c as a substantive rule of evidence reflecting specific policy concerns about hearsay in domestic violence cases." *Id.* A statement admitted under MCL 768.27c must be "made under circumstances that would indicate the statement's trustworthiness." MCL 768.27c(1)(d). MCL

[1] Defendant asserts in his brief that he did not receive any credit for the 227 days served, either against the maximum sentence for the offense from which he was paroled or against his new minimum sentence. There is no indication in the record that defendant failed to receive credit on the earlier offense. Because defendant bears the burden of furnishing this Court with a record to verify the factual basis for his argument and he did not do so with regard to this claim, the argument fails. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000) ("As the appellant . . ., defendant bore the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated.").

768.27c(2) provides a non-exhaustive list of factors for the trial court to consider in determining whether a statement is trustworthy.

Defendant argues that the victim's statement was inadmissible because it was not made under circumstances that would indicate the statement's trustworthiness. He contends that the victim harbored bias against him for his acts of infidelity with another woman. He also contends that the trial court erred by failing to make express findings concerning the statement's reliability. These arguments are without merit. In *Meissner*, 294 Mich App at 449, we explained that the factors listed in MCL 768.27c(2) "are not the sole means to establish trustworthiness" and that "subsection (2) does not require a trial court to make factual findings regarding the three [factors]." Furthermore, the record contains evidence of the statement's trustworthiness. For instance, the victim corroborated her own statement at trial, as she offered testimony that was consistent with the statement. See *id.* at 448-449 (the victim's testimony at trial can corroborate her prior statement). Additionally, there was circumstantial evidence corroborating the victim's statement; one of the police officers with whom the victim spoke testified that the victim was "visibly shaken" when he arrived. Further, although defendant argues that the victim harbored bias against him because of his infidelity, evidence of defendant's infidelity had not been introduced at the time the statement was offered into evidence. And evidence of bias does not necessarily preclude admission of a prior consistent statement. It is but one of many factors for the trial court to consider. *Id.* On this record, defendant cannot demonstrate plain error.

Defendant next argues that MCL 768.27c did not apply to the victim's statement because he acted in self defense. This argument is without merit. In order for MCL 768.27c to apply, "the action in which the evidence is offered" must be "an offense involving domestic violence," which does not include an act of self-defense. MCL 768.27c(1)(b); MCL 768.27c(5)(b). Although defendant testified that he acted to defend himself from the victim's aggressive behavior, at the time the victim's statement was offered into evidence, there was no evidence that defendant acted in self-defense. Moreover, the only evidence on the record at that time was inconsistent with the theory that defendant acted in self-defense. The victim testified that defendant choked her, hit her, bit her, and spit on her; these are acts of domestic violence under MCL 768.27c(5)(b)(1). Accordingly, the trial court did not plainly err when it admitted the statement.

We also reject defendant's argument that the victim's prior consistent statement was inadmissible because it was irrelevant. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The victim's prior consistent statement was relevant because it affected the credibility of her trial testimony. See *People v Mills*, 450 Mich 61, 72-73; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). Additionally, contrary to defendant's contentions, the evidence would have survived a challenge under MRE 403 because it was not unfairly prejudicial. "Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury." *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005). Evidence is unfairly prejudicial when it injects "extraneous considerations" into the matter, such as considerations that invoke the jury's bias, sympathy, or anger. *Id.* Evidence of the victim's prior consistent statement was highly probative of the victim's credibility with regard to her testimony about the assault because the fact that the victim made a prior statement

that was consistent with her trial testimony tends to make it more probable that her trial testimony was credible. Further, although this evidence was prejudicial to defendant, it was not unfairly prejudicial. Nothing about the evidence would have invoked the jury's bias, sympathy, or anger.

In addition to raising evidentiary challenges to the admission of the victim's prior consistent statement, defendant argues that MCL 768.27c violates the separation-of-powers doctrine by interfering with our Supreme Court's exclusive authority to enact rules concerning court practice and procedure. The Michigan Supreme Court has exclusive authority to "establish, modify, amend and simplify the practice and procedure in all courts of this state." Const 1963, art 6, § 5. As explained in *People v Watkins*, 491 Mich 450, 472-473; 818 NW2d 296 (2012), quoting *McDougall v Schanz*, 461 Mich 15, 27; 597 NW2d 148 (1999):

> In accordance with separation-of-powers principles, [our Supreme] Court's authority in matters of practice and procedure is exclusive and therefore beyond the Legislature's power to exercise. This exclusive authority, however, extends only to rules of practice and procedure, as "this Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law."

Thus, "the Legislature may not enact a rule that is purely procedural, i.e., one that is not backed by any clearly identifiable policy consideration other than the administration of judicial functions." *People v Pattison*, 276 Mich App 613, 619; 741 NW2d 558 (2007).

MCL 768.27c is clearly a rule of evidence. However, not all rules of evidence are procedural and thus within the exclusive purview of our Supreme Court. *Watkins*, 491 Mich at 473, citing *McDougall*, 461 Mich at 29.

> [A] statutory rule of evidence violates Const 1963, art 6, § 5 only when " 'no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified . . . .'" Therefore, "[i]f a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration . . . the [court] rule should yield." [*Id.* at 474, quoting *McDougall*, 461 Mich at 30-31.]

MCL 768.27c is a valid legislative enactment that does not violate the separation-of-powers doctrine. See Const 1963, art 6, § 5; *Watkins*, 491 Mich at 472-474, 476-477. As noted in *Meissner*, 294 Mich App at 445, MCL 768.27c is a substantive rule of evidence that reflects the Legislature's policy concerns about hearsay statements in domestic-violence cases. Thus, the statute reflects a policy consideration that is "over and beyond matters involving the orderly dispatch of judicial business." See *Watkins*, 491 Mich at 474.

Defendant nevertheless argues that MCL 768.27c cannot reflect a clear policy consideration beyond the orderly dispatch of judicial business because it permits trial courts to admit irrelevant and unfairly prejudicial evidence without regard to MRE 402 or 403. We disagree. The plain language of MCL 768.27c belies defendant's claim that the statute permits the introduction of evidence that is either irrelevant or unfairly prejudicial in violation of MRE 402 or 403. MCL 768.27c(1) provides, in pertinent part, that evidence of a prior consistent

statement of domestic violence "is admissible if all of the following apply . . . ." The statute does not provide that evidence of a prior consistent statement shall or must be admitted; rather, the statute provides that the evidence is *admissible*. Because the Legislature provided that the evidence is merely admissible, rather than providing that the evidence must or shall be admitted, we will not presume that the Legislature intended for evidence proffered under MCL 768.27c to be admissible irrespective of MRE 402 and 403. See *Watkins*, 491 Mich at 483-484. Absent such an express directive in the statute, we will not infer that evidence offered pursuant to MCL 768.27c is to be free from the constraints of MRE 402 or 403. See *id.*

Next, defendant argues that MCL 768.27c is invalid because it conflicts with MRE 801(d)(1)(B) by permitting the introduction of prior consistent statements for hearsay purposes without compliance MRE 801(d)(1)(B). When determining whether a rule of evidence and a statute conflict, "[w]e do not lightly presume that the Legislature intended a conflict, calling into question [our Supreme] Court's authority to control practice and procedures in the Courts." *Id.* at 467 (quotation omitted). To determine if a conflict exists, a reviewing court looks to the plain language of the statute to determine the Legislature's intent and enforces the plain language of the statute as written. *Id.* at 467-468. Here, MCL 768.27c declares that prior consistent statements of domestic violence are "admissible," and it neither restricts the use of such statements for non-hearsay purposes nor requires that the prerequisites found in MRE 801(d)(1)(B) be satisfied in order to admit the statements for the truth of the matter asserted therein. Therefore, MCL 768.27c conflicts with MRE 801(d)(1)(B). However, the existence of this conflict between MCL 768.27c and MRE 801(d)(1)(B) does not lead to a conclusion that MCL 768.27c violates the separation-of-powers doctrine. As explained in *Watkins*, 491 Mich at 474, "statutory rules of evidence that reflect policy considerations 'over and beyond matters involving the orderly dispatch of judicial business' are substantive, and in the case of a conflict with a court rule, the legislative enactment prevails." While MRE 801(d)(1)(B) is an evidentiary rule and not a court rule, we nevertheless conclude that where MCL 768.27c applies, it supersedes the requirements found in MRE 801(d)(1)(B). See *id.* at 474-475.

D. SENTENCING

Next, defendant raises several challenges to his sentence, each of which is preserved. Under the sentencing guidelines, we review for clear error the trial court's factual determinations, and we review de novo "[w]hether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

1. IMPROPER FACT FINDING AND BURDEN OF PROOF

Defendant first contends that the trial court engaged in improper judicial fact-finding and that offense variables (OVs) can only be scored if the facts supporting the scoring are established beyond a reasonable doubt. Our Supreme Court rejected this argument in *People v Drohan*, 475 Mich 140, 142, 159-164; 715 NW2d 778 (2006). We are bound by that decision. *Watson*, 245 Mich App at 597.

2. OFFENSE VARIABLES

Defendant also argues that the preponderance of the evidence did not support the trial court's scoring of OVs 3, 4, 10, and 19. We disagree.

Concerning OV 3, MCL 777.33(1)(d) permits the trial court to score ten points if "[b]odily injury requiring medical treatment occurred to a victim . . . ." Here, the trial court did not err by finding that the victim suffered bodily injury as she testified that defendant choked her twice, struck her on the jaw, and bit her finger.

We also reject defendant's challenge to the scoring of OV 4 at ten points. MCL 777.34(1)(a) directs the trial court to score ten points if "[s]erious psychological injury requiring professional treatment occurred to a victim." Under OV 4, the victim does not need to seek treatment in order to justify the trial court's scoring decision. *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009). Indeed, an expression of fear by the victim is sufficient to support the trial court's scoring under OV 4. *Id.*, citing *People v Apgar*, 264 Mich App 321; 329; 690 NW2d 312 (2004). Here, the victim testified that defendant choked her twice, struck her in the jaw, bit her finger, and spit in her face twice. She testified that she was screaming and pleading for him to stop and that the choking caused her to urinate on herself. The responding police officer testified that the victim was "extremely scared looking," crying, visibly shaken, whispering, and asked to be placed in a locked patrol vehicle before the officers undertook to confront defendant. The presentence investigation report indicates that the victim told the responding officer that she was scared for her life.[2] Accordingly, the preponderance of the evidence supports the trial court's scoring of ten points under OV 4.[3]

Next, we find meritless defendant's challenge to the scoring of OV 10 at ten points. MCL 777.40(1)(b) directs the trial court to score ten points if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status[.]" Here, defendant does not argue that he was not in a domestic relationship with the victim. Further, the preponderance of the evidence supports that defendant exploited his domestic relationship with the victim when he assaulted her. Specifically, the victim was in her daughter's bedroom before the assault, and defendant asked the victim to come downstairs, alone with him, in order to speak. Defendant testified that he was upset with the victim because she received a telephone call from the father of one of her children. Given that defendant was upset about the telephone call and that defendant used his domestic relationship with the victim to isolate her before the attack, the preponderance of the evidence demonstrates that defendant exploited his domestic relationship with the victim. See *People v Wilson*, 252 Mich App 390, 395; 652 NW2d 488 (2002).

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[2] "There is a presumption that the information contained in the PSIR is accurate unless the defendant raises an effective challenge." *People v Lloyd*, 284 Mich App 703, 705; 774 NW2d 347 (2009).

[3] Although defendant argues that cases such as *Davenport (After Remand)* are incorrect because fear is not a "serious" psychological injury, we are bound by those decisions. MCR 7.215(J)(1); *People v Waclawski*, 286 Mich App 634, 677; 780 NW2d 321 (2009).

We also reject defendant's challenge to the trial court's decision to score ten points under OV 19. MCL 777.49(c) authorizes the trial court to score ten points under OV 19 if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice . . .." Here, the presentence investigation report indicates that when police arrived at the scene, defendant was sitting on the front steps outside the victim's home. When he saw the cruiser, defendant got up and started walking into the home. The responding officer "yelled to [defendant] to stop," at which time defendant entered the home and closed the door. The officers were eventually able to speak with the victim and then attempted to locate and speak with defendant. Defendant began running through the woods out back. The responding officer issued a "loud verbal command advising the defendant . . . that he needed to stop running," which defendant ignored. Defendant was finally apprehended by another officer. Due to defendant's disregard of a direct order from the police, the preponderance of the evidence supports that defendant interfered with the administration of justice. See *People v Ratcliff*, 299 Mich App 625, 633; 831 NW2d 474 (2013), vacated in part on other grounds *People v Ratcliff*, ___Mich___; ___NW2d___ (Docket No. 146861, entered October 25, 2013).

In reaching this conclusion, we reject defendant's claim that OV 19 is void for vagueness and that the rule of lenity requires this Court to find in defendant's favor. "A statute is not vague if the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises, or their generally accepted meaning." *People v Vronko*, 228 Mich App 649, 653; 579 NW2d 138 (1998). Regarding OV 19, our Supreme Court in *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004), found "the language of the statute [to be] plain and unambiguous . . . ." Thus, contrary to defendant's assertions, the statute is not unconstitutionally vague. See *Vronko*, 228 Mich App at 653. Furthermore, because the language of OV 19 is plain and unambiguous, we reject defendant's argument that the rule of lenity requires us to find in his favor. See *People v Denio*, 454 Mich 691, 700 n 12; 564 NW2d 13 (1997) (quotation omitted) ("The rule of lenity properly applies only in the circumstances of an ambiguity, or in the absence of any firm indication of legislative intent.").[4]

E. ISSUES RAISED IN STANDARD 4 BRIEF

1. VICTIM'S PRIOR INCONSISTENT STATEMENT

Defendant makes numerous arguments in his Standard 4 Brief, the first of which is that the trial court abused its discretion when it excluded evidence of the victim's prior inconsistent statement. During cross-examination, the victim denied implicating defendant in an unrelated

[4] On the issue of OV 19, we note that defendant purports to raise a due-process argument. In doing so, he essentially repeats his argument that his conduct did not justify the scoring of OV 19. Because defendant fails to cite any authority or develop his argument that the trial court's scoring decision violated due process, he abandons his claim. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Further, for the reasons discussed above, any challenge to OV 19 is meritless.

armed robbery when she spoke with police officers on the day of the assault. Defendant attempted to introduce extrinsic evidence that the victim made such a statement.

We conclude that the trial court's decision to exclude this evidence was not an abuse of discretion because this evidence was collateral. Although a party may impeach a witness with extrinsic evidence of a prior inconsistent statement, MRE 613(b), a party may not do so on matters that are collateral, *People v LeBlanc*, 465 Mich 575, 590; 640 NW2d 246 (2002). Impeachment evidence is not collateral if it relates to the substantive issues in the case or "matters closely bearing on a defendant's guilt or innocence," matters related to a witness's bias or interest, or to matters related to "any part of the witness's account of the background and circumstances of a material transaction which as a matter of human experience he would not have been mistaken about if his story were true." *Id.*; *People v Rosen*, 136 Mich App 745, 759; 358 NW2d 584 (1984). Here, the fact that the victim told police officers that defendant was involved in an unrelated armed robbery had no bearing on whether defendant committed the assault. Nor did the evidence pertain to the victim's alleged bias or interest where there was no indication in the record that the victim's implication of defendant in the armed robbery was false. Furthermore, the evidence did not pertain to the victim's account or circumstances of the assault. Consequently, the evidence was collateral and inadmissible. See *LeBlanc*, 465 Mich at 590; *Rosen*, 136 Mich App at 759. For that reason, we decline to address defendant's arguments related to the witnesses who would have testified to the collateral matter.

2. PROSECUTORIAL MISCONDUCT

Defendant also raises several unpreserved issues of prosecutorial misconduct. Because the challenged conduct was "not preserved by contemporaneous objections and requests for curative instructions, appellate review is for outcome-determinative, plain error." *Unger*, 278 Mich App at 235. We will not find error requiring reversal where a curative instruction could have cured the prejudice, if any, caused by the prosecutor's statements. *Id.*

Defendant first contends that the prosecutor committed misconduct by seeking to admit evidence of the victim's prior consistent statement and by using this evidence to improperly bolster the victim's credibility during closing argument. Introducing evidence of the victim's prior consistent statement was not improper because the evidence was admissible. See *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). Moreover, the prosecutor did not improperly bolster the victim's credibility during closing argument. The prosecutor argued that the victim was a credible witness based on the evidence presented. See *People v Bennett*, 290 Mich App 465, 478; 802 NW2d 627 (2010) (the prosecutor may argue, based on the evidence presented, that a witness is worthy of belief).

Next, we reject defendant's argument that the prosecutor committed misconduct by arguing that injuries do not always leave bruises. During rebuttal, the prosecutor called upon the jurors to rely on their common sense and argued that, based on his experience, not all injuries leave bruises or other visible signs. This argument was not improper. The prosecutor may both respond to arguments made by defense counsel and ask jurors to rely on their common sense. *People v Ackerman*, 257 Mich App 434, 453-454; 669 NW2d 818 (2003); *People v Lawton*, 196 Mich App 341, 355; 492 NW2d 810 (1992).

Additionally, we reject defendant's arguments that the prosecutor denigrated him during closing argument. The prosecutor may not denigrate the defendant or defense counsel by personally attacking either one of them. *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003). Likewise, the prosecutor may not personally attack the defendant's credibility with "intemperate and prejudicial remarks" and may not suggest that a defendant or defense counsel is trying to manipulate or mislead the jury. *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995); *Watson*, 245 Mich App at 592. Here, the prosecutor began closing argument by arguing that the evidence supported the victim's testimony. Then, the prosecutor argued that defendant attempted to avoid the consequences of his actions and that he was not credible. The prosecutor did not denigrate defendant when he argued that defendant was attempting to avoid the consequences of his actions. This argument was a reasonable inference drawn from the evidence produced at trial. See *Dobek*, 274 Mich App at 67 (the prosecutor is permitted to argue, based on the evidence, that the defendant was not credible). Indeed, defendant fled from the police and admitted at trial that he was not truthful with police officers regarding whether his argument with the victim turned physical. Moreover, during his testimony, defendant repeatedly blamed the victim for starting the altercation. He indicated that the victim remained upset throughout the evening over defendant's infidelity and complained that the victim "wouldn't get over" his infidelity. Where defendant attempted to evade police and shift the blame to the victim, we decline to find that the prosecutor's argument was improper. See *id.*

We also reject defendant's argument that the prosecutor denigrated his trial counsel during rebuttal. During closing argument, defense counsel argued that the altercation started because the victim was upset and jealous about defendant's infidelity. During rebuttal, the prosecutor argued that defendant was trying to avoid the consequences of his actions and that defense counsel "fell right into" defendant's attempt to do so with his closing argument. When viewed in context, the prosecutor's argument was not improper because it was a response to defense counsel's closing argument that the victim's jealousy started the altercation. The prosecutor did not, contrary to defendant's assertions, suggest that defense counsel was trying to distract the jury from the truth. See *id.* (the prosecutor cannot argue that defense counsel is trying to mislead the jury). Rather, the prosecutor noted that counsel's argument was consistent with defendant's attempt to avoid responsibility for his actions. Accordingly, defendant's claim that the prosecutor denigrated defense counsel is without merit. Moreover, even assuming the prosecutor's argument was improper, defendant is not entitled to relief because the prejudice, if any, caused by these remarks could have been cured by a timely request for a curative instruction. See *Unger*, 278 Mich App at 237.

Because we have rejected each of defendant's assertions of prosecutorial misconduct, we reject his assertion that the cumulative effect of the alleged prosecutorial misconduct denied him his right to a fair trial. See *McLaughlin*, 258 Mich App at 649. We also reject defendant's argument that he is not required to show prejudice in order to be entitled to relief on a claim of prosecutorial misconduct because this contention does not find support in our case law, see, e.g., *Bahoda*, 448 Mich at 265; *Dobek*, 274 Mich App at 63, and defendant, in this case, must demonstrate prejudice to avoid forfeiture under the plain-error rule, *Carines*, 460 Mich at 763.

3. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, we reject defendant's claim that his trial counsel was ineffective for failing to both raise the meritless sentencing objections noted above and admit evidence of the victim's prior inconsistent statement. Trial counsel raised each of these issues in a motion for resentencing; thus, his performance was not objectively unreasonable. See *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012), citing *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Moreover, defendant cannot establish prejudice because, as discussed *supra*, each of these issues is without merit. See *id.*

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering